Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE SCHWABENLAND and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,	)	
Petitioners,	)	No. 81-7064 81-7075
v.	)	
SANGER BOATS and TRAVELERS INSURANCE COMPANY,	)	OPINION*
Respondents.	)	

Petition for Review of a Decision
of the Benefits Review Board
Argued and Submitted February 12, 1982

Before: CHOY, PREGERSON, and POOLE,
Circuit Judges.

CHOY, Circuit Judge:

Lawrence Schwabenland petitions for review of the Benefits Review Board's (the Board) denial of his claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.

* Filed July 26, 1982, Phillip B. Winberry Clerk, U.S. Court of Appeals

§§ 901-50 (the Act). Because the Board applied the wrong test for determining Schwabenland's employee "status" and because we are convinced that he meets the test we announced in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961 (9th Cir. 1975) cert. denied, 429 U.S. 868 (1976), we reverse and remand.

I

At the time of his injury, Schwabenland was employed as the sales manager for Sanger Boats (Sanger), a manufacturer and seller of custom-built, high-performance recreational and racing boats. He spent approximately 30 percent of his working time inspecting boats in various stages of production to ensure that they conformed to the buyers' specifications and were free from cosmetic defects. In addition to his sales and inspection duties, Schwabenland acted as

the primary test driver and pilot of new model boats (thereby participating in the development of the models), performed occasional maintenance on the boats, and participated in approximately 30 weekend races per year in which he drove Sanger's boats for promotional purposes. Schwabenland was injured on July 29, 1973 when the boat he was testing flipped over.

Sanger paid Schwabenland workers' compensation disability benefits under California law but Schwabenland claimed the higher compensation available under the Longshoreman's Act. Sanger and its workers' compensation insurer, Travelers Insurance Company (Travelers), contested his claim to benefits under the Act because they did not believe that he qualified as an "employee," a term defined by § 2(3) of the Act as a "person engaged in maritime employment." Schwabenland then

filed a claim for compensation with the United States Department of Labor.

Determining Schwabenland's "employee" status by reference to his "overall activities," an administrative law judge denied Schwabenland's claim for compensation under the Act. The judge ruled that Schwabenland did not fall within the class of covered employees because his employment did not have "a realistic significant relationship to the maritime activities involving navigation and commerce over navigable waters contemplated by Congress in amending the Federal Act."

On appeal, the Board also focused on Schwagenland's overall employment and held that a worker must spend a substantial amount of work time performing maritime duties in order to fall within the coverage of the Act. Thus, while Schwabenland's activities at the time of

the injury "were arguably maritime in nature," the Board considered it unnecessary to determine whether "this work constituted maritime employment since there is no evidence in the record that claimant's work testing and racing employer's boats occupied a substantial portion of his time."

Schwabenland asserts that the Board was incorrect in requiring that maritime activities occupy a "substantial portion" of his time and also argues that he satisfies the employee "status" test required for coverage under the Act. Sanger and Travelers dispute Schwabenland's "status" and argue that in enacting the Act, Congress never intended to cover the recreational-boat industry and, therefore, Schwabenland's injuries are not compensable under the Act. 1/

We will set aside the Board's decision only if it is unsupported by substantial evidence or is predicated upon an erroneous view of the law. Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d 827, 830 (9th Cir. 1981). In this case the facts are uncontroverted and the questions before this court are purely ones of law.

II

To be eligible for compensation under the Act, a claimant must sustain an injury

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1. On appeal, Sanger also argues that Schwabenland, because he was "the master or member of a crew" of a vessel, is not an employee under § 2(3) of the Act, 33 U.S.C. §902(3). We need not consider this question because it was not raised before the Board. See Parker v. Motor Boat Sales, Inc. 314 U.S. 244, 251 (1941); Moore Dry Dock Co. v. Pillsbury, 169 F.2d 988, 991 (9th Cir. 1948).

within the "situs" defined by § 3(a) of the Act [2] and must have the "status" of an employee as defined by § 2(3). [3] It is not disputed that Schwabenland meets the situs requirement: his injury occurred on the Oakland Estuary, a navigable water

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2. To satisfy the situs requirement, a claimant must sustain an injury upon

> the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a)

3. To satisfy the status requirement, a claimant must be

> any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (emphasis added).

of the United States. Thus, the main issue is whether Schwabenland's test-driving and boat inspection duties make him an "employee" i.e., a person "engaged in maritime employment," under § 2(3).

We have stated that for employment to be maritime, it "must have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Weyerhaeuser Co. v. Gilmore, 528 F.2d at 961 (quoting Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 272 (1972)). In Weyerhaeuser, we noted that "[t]he occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; i.e., the perils of the sea and an unseaworthy vessel recognized under maritime laws." Id.

Using the Weyerhaeuser test, courts have held that the Act covers workers involved in construction related to maritime activities. See Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs, 644 F.2d at 830-31 (employee involved in construction of tie-up for incoming ships covered under Weyerhaeuser test); Odom Construction Co. v. United States Department of Labor, 622 F.2d 110, 113 (5th Cir. 1980) (land-based construction worker injured after moving concrete blocks used as tie-ups covered under Weyerhaeuser test), cert. denied, 450 U.S. 966 (1981); cf. Trotti & Thompson v. Crawford, 631 F.2d 1214, 1220-22 (5th Cir. 1980) (carpenter constructing pier engaged in maritime employment). Coverage has also been extended to work related to the construction of recreational boats. See Mississippi Coast Marine, Inc. v. Bosarge,

637 F.2d 994, 998 (carpenter working on 30-foot pleasure boat resting on blocks covered under Weyerhaeuser test), modified in part, 657 F.2d 665 (5th Cir. 1981). It is undisputed that Schwabenland conducted visual inspections of boats under construction to make certain that they were in compliance with the orders received. The inspection duties, the testing of new models to evaluate their design, and the performance of occasional maintenance in connection with the testing activities would seem to be sufficiently related to the construction of the vessels to constitute maritime employment covered under the Act.

The Board, however, determined Schwabenland's maritime-employee status by reference to his overall employment and found that Schwabenland had not spent a substantial portion of his work time

performing maritime duties. Consequently, the Board found that Schwabenland was not a maritime employee under the Act.

The Board's "substantial portion" test is a fairly-recent pronouncement. See Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979), rev'd, 632 F.2d 1346 (5th Cir. 1980). Only two circuits have had the opportunity to examine the test and both have rejected it. See Graziano v. General Dynamics Corp., 663 F.2d 340, 343 (1st Cir. 1981); Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346, 1348 (5th Cir. 1980); cert. denied, 101 S. Ct. 3049 (1981).

The Supreme Court has never directly addressed the "substantial portion" test but is has said that the status requirement is satisfied as long as "some portion" of the employee's work time involves maritime activities. See Northeast Marine

Terminal Co., Inc. v. Caputo, 432 U.S. 249, 273 (1977) (employees who spend at least some of their time in indisputably longshoring operations are longshoremen under the Act). To substitute "substantial" for "some" would depart from the letter and the spirit of Caputo, see Boudloche v. Howard Trucking Co., Inc., 632 F.2d at 1348, and would be contrary to the Supreme Court's directive to take an expansive view of the coverage to give effect to the remedial purpose of the Act. See Northeast Marine Terminal, Co., Inc. v. Caputo, 432 U.S. at 268; Ramos v. Universal Dredging Corp., 653 F.2d 1353, 1358-59 (9th Cir. 1981).

We therefore reject the Board's "substantial portion" test. Because the facts are not disputed, we are able to determine whether Schwabenland was a maritime employee within the meaning of § 2(3).

We hold that Schwabenland's regular performance of maritime operations, even though it constituted less than a "substantial portion" of his overall working time, was sufficient to satisfy the status requirement of § 2(3). 4/

III

Sanger and Travelers attempt to limit the reach of the Act by contending that it was never meant to cover the small recreational-boat industry. They argue that the legislative history shows that Congress did not intend to include the industry within the benefited class covered.

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4. We need not decide whether Schwabenland should be able to recover because he was engaged in maritime employment at the moment of his injury. See Hullinghorst Industries v. Carroll, 650 F.2d 750, 754 (5th Cir. 1981), cert. denied, 102 S. Ct. 1037 (1982). We have previously rejected the "moment of injury" test when its adoption would have denied recovery. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 140 (9th Cir. 1978)

The only support cited for this contention, however, is a minor excerpt from a floor debate in the House of Representatives. 5/ We do not believe that the debate is helpful to the resolution of the issue.

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5. The following debate occurred on the floor of the House involving Mr. Graham, the Chairman of the House Judiciary Committee (which reported out the 1927 Act,) over the scope of pre-amendment § 3(a):

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
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> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, "including any dry dock"?
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> Mr. Abernethy: Yes.
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> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small shipyard. I can assure the gentleman that it will not. A dry dock is under admirality, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it can not include a shipyard.
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> . . . .
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> Mr. Abernethy: As I understand, this bill takes from its provisions seamen,

The Supreme Court has implied that the Act does not exclude persons employed in the recreational-boat industry. In Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), the Court held that a janitor, employed by a small motorboat and outboard-motor supplier, was covered under the Act. The Court commented that the janitor had been engaged in a "clearly maritime activity" when he drowned after the 18-foot motorboat in which he was riding capsized while another employee was testing an outboard motor. Id. at 247. The type of vessel or the nature of the industry involved does not appear to have been significant.

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fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.

Mr. Graham: That is correct.

68 Cong. Rec. 5403 (1927)

Although the Act has been substantially amended since the Parker decision, see the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat 1251, there is no indication that Congress, in amending the Act, intended to limit its coverage solely to claimants injured in connection with the nonrecreational-boat industry. Moreover, to impose the difficult requirement of determining which operations are commercial and which are recreational would seem to conflict with the goals of the 1972 amendments to provide uniform coverage and to eliminate jurisdictional problems.

The Fifth Circuit, the only circuit to have addressed this issue, has determined that the Act is applicable to recreational-boat builders. See Mississippi Coast Marine v. Bosarge, 637 F.2d at 996. The Board has likewise concluded that the

Act applies to the small recreational-boat industry. See Napoles v. Donzi Marine, Inc., 5 BRBS 685, 698, BRB No. 76-262 (April 6, 1977) (extending coverage to a manufacturer of small boats and pleasure crafts).

The Supreme Court's decision in Parker, the explicit statutory provisions of the Act, and the decision by the Fifth Circuit and the Board persuade us to reject Sanger's and Traveler's contention. We therefore hold that the small recreational-boat industry is covered by the Act.

The Board's decision is reversed and the case is remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

Appendix B

BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

No. 79-314
& 79-314A

LAWRENCE SCHWABENLAND

Claimant-Petitioner

v.

SANGER BOATS

and

TRAVELERS INSURANCE COMPANY

Employer/Carrier-
Respondents

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Petitioner

DECISION AND ORDER*

Appeal from the Decision and Order of Joseph A. Matera, Administrative Law Judge, United States Department of Labor.

Richard C. Watters and David L. Simerly, (Miles, Sears and Eanni), Fresno, California, for the claimant.

*Filed Dec. 11, 1980 by Agnes Kurtz, Clerk

Albert H. Sennett (Hanna, Brophy, MacLean, McAleer and Jensen), San Francisco, California, for the employer/carrier.

Joshua T. Gillelan, II (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

These are appeals by claimant and the Director, Office of Workers' Compensation Programs, from the Decision and Order (78-LHCA-1118-S) of Administrative Law Judge Joseph A. Matera pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (hereinafter referred to as the Act).

In his decision, the administrative law judge held that claimant was not an

"employee," as defined in Section 2(3) of the Act, 33 U.S.C. §902(3), since his overall duties as sales manager lacked a significant relationship to maritime activities. Claimant and the Director appeal, arguing that claimant was engaged in maritime employment within the meaning of Section 2(3) of the Act. Oral argument in this case was held on January 29, 1980, in San Francisco, California. 1/

Claimant was employed as sales manager by Sanger Boats (hereinafter referred to as employer). Employer manufacturers high performance recreational and racing boats with a maximum weight of 3,600

1/ For purposes of oral argument, this case was consolidated with Ziemer v. The Stone Boat Yard, BRB No. 79-382 and Palmer v. Delta Marina Industries, BRB No. 79-293. However, the Decisions and Orders in these cases are being issued separately.

pounds. Claimant was responsible for the acquisition of new orders for boats. While testing the racing boat Joker's Wild on a weekend racing trip, he was injured when the boat flipped over in the Oakland Estuary.

In order to be covered by the Act, claimant must show that he was an employee as defined in Section 2(3), 33 U.S.C. §902(3), and that he was injured on a situs covered by Section 3(a). 33 U.S.C. §903(a). Claimant was injured in the Oakland Estuary, a body of navigable water and clearly a covered situs under Section 3(a). The sole issue therefore is whether claimant was a maritime employee as defined in Section 2(3). 2/

2/ Section 2(3) provides as follows:

> The term "employee" means any person engaged in maritime employment, including any long-

The Director contends that claimant's work with small, recreational vessels of under 3,600 pounds was clearly maritime in nature. The administrative law judge's denial of benefits was not based on his interpreting the Act as excluding work in connection with such vessels. However, the argument that the size of a vessel may be dispositive of coverage goes to the heart of the Board's subject matter jurisdiction and must, therefore, be considered. See Ramos v. Universal Dredging Corp., 10 BRBS 368, BRB Nos. 78-466/A (1979).

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shoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The Act does not contain an express exemption from coverage for persons whose work involves vessels of a certain size or use. 3/ However, in listing the occupations specifically covered by Section 2(3), Congress referred to ship repairmen, shipbuilders, and ship-breakers rather than persons involved with boats or vessels. Therefore, it must be determined whether use of the word "ship" excludes vessels similar to the small, recreational boats with which claimant worked.

In Napoles v. Donzi Marine, Inc., 5 BRBS 685, BRB No. 76-262 (1977), the

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3/ Section 2(3) contains an express exemption for all persons engaged by the master to load, unload or repair any vessel under 18 tons net. This exclusion is not applicable herein as claimant was neither engaged by the master nor was he involved in loading, unloading, or repairing any vessel. See Fuduli v. Maresca Boatyard, 7 BRBS 982, BRB No. 77-335 (1978).

Board considered various constructions of the terms "ship," "boat," and "vessel," and concluded that it was impossible to distinguish a "ship" from a "boat" or "vessel" based on size or other factors. 4/ The Board found that the technical definition in U.S. v. Kelly, 26 Fed. Cas. 697 (D.C. Mass. 1863), describes a ship as a three-masted vessel navigated with sails. However, in a generic sense, a ship is any seagoing craft larger than an undecked boat. The Board also found that a "boat" is often defined as a "small open

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4/ The word "vessel" also appears in Section 2(3) as well as the legislative history. See H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12-13 (1972). However, the Board has held that the principle of ejusdem generis requires that the work "vessel" refer to classes of ships and not to every class of vessel since the word "ship" appears first in Section 2(3). Napoles v. Donzi Marine, Inc., 5 BRBS 685, BRB No. 76-262 (1977).

vessel or watercraft, usually moved by oars or by rowing," while the term "vessel" in its broadest sense generally includes "any description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water." Napoles, 5 BRBS at 692, 693. Based on these definitions, the Board determined that the word "ship" could not be defined with sufficient specificity to be used as a means of excluding certain types of watercraft. Therefore, the Board held that neither the size of a vessel nor its designation as a ship, boat or otherwise was determinative in ascertaining the scope of Section 2(3) of the Act.

In admiralty cases, courts often construe the term "ship" to include all navigable structures intended for transportation, other than boats belonging to

other vessels. See Cope v. Vallette Dry Dock Co., 119 U.S. 625 (1887); Perry v. Haines (The Robert W. Parsons), 191 U.S. 17 (1903). In Perry v. Haines, the Supreme Court held Erie Canal barges, called canal "boats," covered as ships or vessels within the admiralty jurisdiction. Stating that maritime jurisdiction turns on the purpose for which the vessel is built rather than its size or form, the court cited cases where jurisdiction was based on navigability of the vessel, including coverage of a fishing boat only 24 feet long.

A number of vessels not involved in trade or commerce, including recreational boats, have been held covered by admiralty jurisdiction. See London Guarantee and Accident Co. v. Industrial Accident Commission, 279 U.S. 109 (1929); Continental Insurance Co. v. Clayton Hardtop Skiff

No. NJ 2281 B (The Skipton), 367 F.2d 230 (3d Cir. 1966); Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976); Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973). Moreover, in cases under the Act, both before and after the 1972 amendments, the Board and the courts have held the builders and repairmen of numerous vessels covered even though those vessels could not meet a technical or traditional definition of "ship." See Parker v. Motor Boat Sales, 314 U.S. 244 (1941) (18-foot motorboat); Dravo Corp. v. Maxim, 545 F.2d 374 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977) (barge); Continental Casualty v. Lawson, 64 F.2d 802 (5th Cir. 1933) (five-ton tug); Ward v. Newport News Shipbuilding and Dry Dock Co., 8 BRBS 353, BRB No. 77-718 (1978) (submarine). Thus, case law construing the term "ship" does not limit the use of

the term to vessels of a certain size or use.

The legislative history of the Act provides little guidance in interpreting the scope of Section 2(3) insofar as small or recreational boats are concerned. These vessels are not specifically mentioned in either the Act or the official committee reports. Boating associations representing the recreational boating industry did not testify or otherwise participate in the legislative process in either 1927 or in 1972. However, as the Board noted in Napoles, supra, while failure to include recreational boating within the scope of the hearings lends support to the argument that such boating is not within the jurisdiction of the Act, the lack of representation at the hearings and lack of comment or reference to recreational boating is insufficient to

remove the industry from coverage, especially if the language of the Act and legislative intent indicate otherwise. The only indication that those involved with small boats were to be excluded from the original Act occurred in floor debate involving Mr. Graham, Chairman of the House Judiciary Committee, which reported out the 1927 Act. However, this discussion involved the scope of coverage under pre-amendment Section 3(a). 5/ Therefore, this discussion is not helpful in ascertaining the scope of Section 2(3).

5/ This exchange was as follows:

> Mr. Abernethy. As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham. The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
>
> Mr. Abernethy. Yes.

Furthermore, employees injured on small recreational boats were covered by the pre-amendment Act so long as the Act's situs requirement was met. For example, in Parker v. Motorboat Sales, Inc., 314 U.S. 244 (1941), the Supreme Court found coverage where a janitor employed by a manufacturer of recreational boats was killed while riding in an 18-foot

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> Mr. Graham. And the gentleman was apprehensive that that might possibly cover a small ship yard. I can assure gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and a dry dock is defined legally, so that it cannot include a shipyard.
>
> Mr. Abernethy. As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham. That is correct

68 Cong. Rec. 5403 (1927).

motorboat on navigable waters. The Court concluded that claimant's riding in the boat was "clearly maritime activity." 314 U.S. at 227. Thus, the pre-amendment Act did not exclude persons injured on small or recreational vessels.

While the 1972 amendments made significant changes in coverage under the Act, the amendments did not limit the Act's coverage to claimants injured in connection with large, commercial vessels. The legislative history indicates that the purpose in amending Section 2(3) was to eliminate the shifting coverage resulting from the emphasis on whether the injury occurred on land or water. These changes involved the addition of the "maritime" employment requirement to Section 2(3) as well as expanding the situs requirement in Section 3(a). In adopting these changes, Congress gave no indication that coverage

under the Act was to be restricted to employees working with vessels of a certain size or use. Considering the broad interpretations in case law of the terms "ship" and "vessel," the terms used in the legislative history as well as in the Act, I cannot conclude that Congress selected that language to exclude claimants working with a certain type of ship or vessel. Absent a more specific expression of congressional intent to exclude these employees, I must conclude that Congress did not intend to do so.

Accordingly, I agree with the Board's reasoning in Napoles v. Donzi Marine, Inc., that neither size of a vessel nor its designation as a ship, boat or otherwise can have any impact upon coverage under the Act. However, in Napoles the Board further held that "shipbuilding involves all operations necessary to build a ship or

vessel when at least part of that construction takes place over navigable waters or on a dry dock." 5 BRBS at 698. I agree that shipbuilding involves all operations necessary to build a ship or vessel; however, I cannot agree that part of that construction must take place over navigable waters or on a dry dock. This holding requires reading pre-amendment situs requirements into Section 2(3) of the Act, a result which I do not believe is the correct interpretation of Section 2(3). In P.C. Pfeiffer Co., Inc. v. Ford, 44 U.S. 69 (1979), the Supreme Court emphasized that Section 2(3) of the Act contains occupational and not geographical requirements for maritime employment. Claimant's status as a shipbuilder under Section 2(3) thus requires an examination of his duties and their relationship to vessel construction and is not affected by whether his

employer has employees who work on navigable waters or dry docks.

Furthermore, the analysis of the Board in Napoles shifts the emphasis from determining the status of the employee under Section 2(3) to examining the nature of an employer's business and evaluating employer's status as a maritime employer under Section 2(4), 33 U.S.C. §902(4). 6/ This approach differs from the approach usually followed by the Board and courts. Generally, if a claimant is engaged in maritime employment within the meaning of Section 2(3), claimant's employer is automatically a maritime employer as defined by Section 2(4). See Handcor, Inc. v. Director, OWCP, 568 F.2d 143, 7 BRBS 413

6/ Section 2(4) provides that an "employer" is "an employer any of whose employees are employed in maritime employment" upon a situs listed in Section 3(a).

(9th Cir. 1978); Perez v. Sea-Land Service, Inc., 8 BRBS 130, BRB Nos. 77-274/A (1978). I continue to believe that this is the correct approach. Thus, a claimant is engaged in shipbuilding when his duties involve the construction of a vessel, regardless of its size or use. If claimant is engaged in shipbuilding, then employer is a statutory "employer" within the meaning of Section 2(4).

However, even if employees working with small recreational vessels are not ship repairmen, shipbuilders or shipbreakers, such claimants may nonetheless fall within the general category of "maritime employment" as defined in Sedmak v. Perini North River Associates, 9 BRBS 378, BRB No. 77-896, et al. (1978), aff'd sub nom. Fusco v. Perini North River Associates, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980). 7/ In Sedmak, the Board

held that "a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3)." 9 BRBS at 386. In adopting this definition of maritime employment, the Board rejected in part the definition of maritime employment promulgated in Weyerhaeuser v. Gilmore, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), insofar as it required that claimant's employment have a relationship to "traditional" maritime activities. We found that this requirement as well as the requirement that employment relate to the "traditional work

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7/ It is clear that Section 2(3) does not enumerate all possible types of maritime employment. See P.C. Pfeiffer Co., Inc. v. Ford, at note 7.

and duties of a ship's service employment" was unduly restrictive, particularly in light of the more recent Supreme Court decision in Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977), and the Ninth Circuit's approach to issues under Section 2(3) following that decision. See Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); Handcor, Inc. v. Director, OWCP, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978). Thus, the scope of maritime employment under the Sedmak definition is not limited to activities traditionally related to a ship's service.

It is apparent that small recreational boats are involved in navigation regardless of their size or use. However, the Sedmak definition of maritime employment refers to maritime activities involving navigation and commerce. The phrase "navigation

and commerce" was originally derived from Justice Story's opinion in Delovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815), which refers to "contracts relating to navigation, business or commerce of the sea." See Gilmore and Black, The Law of Admiralty, 2d edition, 21. The conjunctions "and" and "or" are often used interchangeably by the courts when referring to the nexus to navigation and/or commerce. See Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Chapman v. City of Grosse Point Farms, 385 F.2d 962 (6th Cir. 1967). Thus, the definition does not require that activities have a nexus to both navigation and commerce in order to be maritime in nature.

In determining whether activities are maritime in nature for the purposes of admiralty jurisdiction, vessels used for noncommercial purposes have not been

excluded. In Campbell v. Loznicka (The Scorpio), 181 F.2d 356 (5th Cir. 1950), the Fifth Circuit held that a person furnishing repairs on the order of the owner of a contrivance which could be used for navigation had a maritime lien enforceable in admiralty. The Ninth Circuit held that the claims of private pleasure craft owners for damage from an oil spill sounded in maritime tort. Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973). The extension of admiralty jurisdiction to the operation of small pleasure craft engaged in noncommercial nafigation was before the Eighth Circuit in St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974). Applying Executive Jet, the court rejected petitioner's argument that traditional maritime activity was limited to commercial activity and held that operation of an 18-foot motorboat was

within the admiralty jurisdiction.

Moreover, excluding vessels used for noncommercial purposes also raises difficulties in determining what constitutes a commercial or noncommercial use. Commercial vessels in a traditional sense are trading ships used for tranportation of goods by sea. While vessels built for recreational purposes generally fall outside this category and may therefore be considered noncommercial, others are less easy to classify. Some water craft built ostensibly for recreational use are actually used for business purposes as, for example, carriage of passengers for hire, which has been held to be a commercial use. See London Guaranty and Accident Co. v. Industrial Accident Commission, supra. Other vessels such as tugboats, submarines and fishing boats, also cannot be easily classified since they are neither used in

traditional commercial trade nor used in recreational activities. Classifying vessels by use thus would create a variety of problems in defining coverage under the Act.

In addition, the exclusion of employees who work with small or recreational boats based on technical distinctions between types of vessels would not be consistent with the often cited principle that "the Act must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328 (1953). A provision excluding boats of a certain size or use was not included in the Act itself or mentioned by Congress in enacting either the original legislation or the 1972 amendments. Such an exclusion restricts the scope of this remedial legislation intended to be broadly

construed. Therefore, an exclusion for small or recreational boats cannot be read into Section 2(3).

Therefore, I conclude that the fact that claimant worked on small, recreational vessels does not exclude him from the coverage of Section 2(3).

To determine whether claimant was covered, it is necessary to examine his duties at Sanger Boat. Claimant and the Director, relying on Parker v. Motorboat Sales, Inc., supra, contend that claimant's duties in testing and development of vessels constituted maritime employment. In Parker, the Supreme Court held that an employee who drowned while riding on a navigable river testing an outboard motor was covered by the Act. The court found that the fact that decedent was a janitor and therefore predominantly a non-maritime employee did not "alter the fact that at

the time of the accident, he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made." 314 U.S. at 247. However, the Parker case was decided before the 1972 Amendments to the Act. In Sedmak, the Board found that pre-amendment case law is not controlling in post-amendment cases, but serves only as a useful framework in which to ascertain maritime employment. 8/ Thus, Parker is not determinative of claimant's status as a maritime employee. 9/

8/ The Ninth Circuit Court of Appeals has indicated that it will no longer follow pre-amendment decisions as the court has concluded that the 1972 amendments "radically changed the basis for an employee's entitlement to federal compensation." Weyerhaeuser Co. v. Gilmore, 528 F.2d at 960.

9/ The fact that claimant was injured upon navigable waters and would have been covered pre-amendment under such precedents as Parker is also an insufficient basis for finding coverage under the amended Act. See Sedmak, 9 BRBS at 385.

Moreover, claimant's work testing the boat Joker's Wild at the time of injury is not dispositive of coverage under Section 2(3). In determining whether claimant's duties constitute employment covered by the Act, we must examine his overall employment rather than his duties at the time when the injury occurred. See Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979); Howard v. Rebel Well Service, 11 BRBS 568, BRB No. 78-502 (1979). Under the standard enunciated in Boudloche and Howard, claimant msut spend a substantial portion of his time preforming duties which are maritime in nature in order to be covered by the Act. Thus, claimant's overall duties must constitute either shipbuilding or "maritime employment" as defined in Sedmak in order for claimant to be covered.

Claimant, in the instant case,

performed no actual construction work on the boats manufactured by employer. Hearing Transcript at 26. He was employed as a salesman, performing duties involving the promotion and sale of employer's boats. Claimant testified that he spent 30 percent of his time inspecting boats in order to insure that they were manufactured in accordance with a customer's order. Claimant was also involved in testing and developing new vessels for possible future construction. Hearing Transcript at 37, 38. Claimant and Director argue that this work constituted an integral part of the construction process. However, the administrative law judge found that claimant's work inspecting boats was incidental to his employment as sales manager and therefore did not constitute shipbuilding. The administrative law judge also held that testing was not a part of vessel construc-

tion. He based this conclusion upon a footnote in the Board's decision in Napoles which stated, "We do not consider the testing of the boat by an employee of the employer to be a part of vessel construction." 5 BRBS at 699.

I agree that claimant's testing and inspection duties cannot be considered an integral part of the construction of a vessel. 10/ Claimant inspected boats under construction to ascertain that the boat contained the proper equipment as ordered by the customer, that it was the proper color and that there were no cosmetic defects on the hull. These duties cannot be considered a part of preparing a vessel for use upon navigable waters; rather, they were incidental to his

---

10/ It is clear that his duties driving employer's racing boats, discussed infra, bore no relation to vessel construction.

employment as sales manager. I also do not believe that claimant's testing activities can be considered as an integral part of shipbuilding. Claimant was not involved in testing completed vessels for final adjustment before delivery to a customer. Rather, he evaluated prototypes for future boat designs. This work was not related to and cannot be considered an integral part of the construction of a vessel. Claimant lacked the direct involvement with shipbuilding which has been found in cases where employees have been held covered by the Act as shipbuilders. See Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976); vacated and remanded, 433 U.S. 904 (1977), reaff'd. 575 F.2d 79 (5th Cir. 1978), cert. denied sub nom. Director, OWCP v. Jacksonville Shipyards, Inc., 440 U.S. 967 (1979).

However, although claimant was not employed as a shipbuilder, he may nonetheless be covered if his employment is within the Sedmak definition of maritime employment, which requires a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." 9 BRBS at 386. In the instant case, claimant's overall duties were directed toward the sale and promotion of the boats manufactured by employer. His work inspecting new boats was part of his sales job. Thus, the only duties her performed which were arguably maritime in nature were testing and evaluating new models of vessels for future construction and driving employer's racing boats in weekend races for purposes of promoting sales. 11/

11/ These races took place on weekends during a six to seven month period each year.

In connection with these racing activities, claimant also occasionally performed general maintenance work. Although not a part of vessel construction, these activities occupied some of claimant's time and were arguably maritime in nature. However, it is not necessary to determine whether this work constituted maritime employment since there is no evidence in the record that claimant's work testing and racing employer's boats occupied a substantial portion of his time. Therefore, this work cannot qualify him for coverage as a maritime employee within Section 2(3) of the Act.

Therefore, although claimant's work with recreational boats weighing 3,600 pounds and less does not exclude him from the Act's coverage, his overall employment as sales manager places him outside the scope of Section 2(3) of the Act.

Accordingly, the Decision and Order of the administrative law judge denying claimant benefits is affirmed.

SO ORDERED.

ISMENE M. KALARIS
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, concurring:

I agree with my colleague that claimant's overall employment as a salesman places him outside the scope of the Longshoremen's and Harbor Workers' Compensation Act. Therefore, I concur in her affirmance of the administrative law judge's denial of benefits to claimant. I believe, however, that there is an additional basis upon which to deny coverage. Unlike Judge Kalaris, I am persuaded by the legislative history of the Act that Congress never intended coverage for those

persons who work with small, non-commercial vessels.

The Longshoremen's and Harbor Worker's Compensation Act was enacted to provide compensation benefits to those workers involved in the loading, unloading or repairing of ships who would not otherwise be entitled to state workers' compensation benefits. The legislative history of the Act evidences no intent on the part of Congress that members of the small boat industry be included within the benefited class.

It is apparent from the Congressional debates and the Committee Reports to the 1927 Act that the concern of Congress at that time was of a very limited nature. In short, Congress was acting to provide coverage only to those persons injured in the building or repairing of large commercial vessels. The Act's draftsmen

and enactors and the many witnesses who testified before Congress referred exclusively, with one exception, to the commercial ship industry. The one exception took the form of the following exchange between Representative Graham, Chairman of the House Committee that reported out the 1927 Act, and Representative Abernethy in which the former dispelled any doubt that small boat workers were not to be included within the scope of the Act:

> Mr. Abernethy: As I understand the gentleman's interpretation of the bill, it does not include small repair yards.
>
> Mr. Graham: The gentleman spoke about the words in the fourth paragraph, 'including any dry dock'?
>
> Mr. Abernethy: Yes.
>
> Mr. Graham: And the gentleman was apprehensive that that might possibly cover a small shipyard. I can assure the gentleman that it will not. A dry dock is under admiralty, so declared in the decisions of the Supreme Court, and dry dock is defined legally,

> so that it cannot include a shipyard.
>
> Mr. Abernethy: As I understand, this bill takes from its provisions seamen, fishermen, and oystermen, and does not include any shipyard or repairyard except a dry dock.
>
> Mr. Graham: That is correct.

68 Congressional Record 5403 (1927)

Congress, in further manifestation of its intent to address only the needs of workers in the longshore and ship industry, specifically incorporated into the Act an "eighteen ton net" exclusion. Found in Section 3(a)(1), 33 U.S.C. §903(a)(1), the exception was directed at excluding fishing vessels and other small craft.

That the Pre-Amendment Act was not meant to cover any person injured on small or recreational boats is therefore clear. Equally as clear is the fact that the 1972 Amendments did nothing to alter that original design. During the hearings on the

1972 Amendments Congress heard from such interest groups as the New York Shipping Association, the Shipbuilders Council of America, and the International Longshoremen Workers Union. Not a single word of testimony was received, however, from anyone associated with the small boat industry - a fact that leads inescapably to the conclusion that Congress did not consider or intend that class of workers to be within the Act's coverage.

Therefore, I would find claimant not to be an employee for purposes of the Longshoremen's and Harbor Worker's Compensation Act irrespective of his overall employment by Sanger Boats as a sales manager.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

MILLER, Administrative Appeals Judge, dissenting:

Because I would hold claimant is a "maritime employee" under Section 2(3) of the Act, I must dissent from my colleagues' denial of benefits in this case. The fact that claimant was injured in the course of his employment over "navigable waters" as that term was understood prior to the 1972 Amendments to the Act is sufficient to warrant coverage under the Act as I have explained in my dissenting opinions to the line of cases including Churchill v. Perini North River Associates, BRBS, BRB Nos. 79-113/A et al. (Oct. 31, 1980), Miller v. Central Dispatch, Inc., BRBS, BRB Nos. 78-467/A & 79-655/A (Sept. 26, 1980), Gilliam v. Wiley N. Jackson, Co., 12 BRBS 556, BRB Nos. 79-388/A (1980), Boudloche v. Howard Trucking Co., Inc., 11 BRBS 687, BRB No. 78-383 (1979), and Sedmak v. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896 et al. (1978),

rev'd sub nom. Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir.), vacated and remanded mem., 100 S.Ct. 697 (1979), aff'd, 622 F.2d 1111 (2d Cir. 1980). For an extensive discussion of the rationale behind this rule, see also Stewart v. Brown & Root, Inc., 7 BRBS 356, BRB No. 76-451 (1978) (Miller responsible), which was leter overruled by a majority of this Board in Sedmak, from which I dissented.

This case, therefore, is controlled by the Supreme Court's decision in Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941), where an employee whose primary duties were those of a janitor and porter was found to be involved in "clearly maritime activity" while riding in a small boat on navigable waters testing an outboard motor. The Supreme Court found that the employee, who was "predominantly a non-maritime employee," was covered under

the provisions of the Act.

It is beyond dispute that this claimant would have been covered under Parker had he been injured prior to the enactment of the 1972 Amendments to the Act, amendments which were described by the Supreme Court as follows: "In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act, (LHWCA 33 U.S.C. §901 et seq., in substantial part to 'extend [the Act's] coverage to protect additional workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess., 1 (1972)." Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, , 6 BRBS 150 (1977). It stretches the imagination to conclude that such an extension would deny coverage to a substantial portion of those employees already covered prior to the 1972 Amendments.

Furthermore, as to the question of whether claimant's "regular" duties mili-

tate against coverage when he was injured while actually engaging in maritime employment, Parker is again controlling. The Supreme Court specifically took note of the fact that the claimant in Parker was

> hired primarily as a janitor and porter, was predominantly a non-maritime employee. For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Cf. Northern Coal Co. v. Strand, 278 U.S. 142, 144, 49 S.Ct. 88, 73 L.Ed. 232; Employer's Liability Assurance Corp. v. Cook, 281 U.S. 233, 236, 50 S.Ct. 308, 309, 74 L.Ed. 823. Moreover, Section 2(4) of the Act, 33 U.S.C.A. §902(4), expressly provides for its application to 'employees [who] are employed *** in whole or in part, upon the navigable waters of the United States.'

314 U.S. at 247 (footnote omitted)(emphasis in original). As I noted in my dissenting opinions in Churchill, Miller, Gilliam,

Boudlache, Howard v. Rebel Well Service, 11 BRBS 568, BRB No. 78-502 (1979), and Sedmak, an employee's usual duties are irrelevant for the purpose of determining coverage under the Act if his injury occurred while he was actually engaging in maritime employment. It is incomprehensible as to how my colleagues can adopt tests which would exclude this claimant and yet remain true to the Supreme Court's directive that the "Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Voris v. Eikel, 346 U.S. 328, 338 (1953). I fail to see how a liberal construction of the Act is achieved when a "substantial portion" test is used to deny benefits to a claimant working over navigable waters, nor can I fathom a more harsh and incongruous result than the denial of benefits to a

claimant who unquestionably would have been covered under the pre-1972 Amendments of the Act. I dissent.

JULIUS MILLER
Administrative Appeals Judge

Dated this 11th
day of December 1980

Appendix C

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
San Francisco Regional Office
Suite 600-211 Main Street
San Francisco, California 94105
CASE NO. 78-LHCA-1118-S
OWCP NO. 13-39266

In the Matter of

LAWRENCE SCHWABENLAND

Claimant

vs.

SANGER BOATS

Employer

THE TRAVELERS INSURANCE COMPANY

Carrier

Richard Watters
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For the Claimant

Frank B. Hugg
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McAleer & Jensen
681 Market Street, Suite 300
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For the Employer
and Carrier

Before: JOSEPH A. MATERA
Administrative Law Judge

DECISION AND ORDER

Jurisdictional and Procedural History

This is a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq. (hereinafter referred to as the Federal Act). After due notice to all parties, a hearing in this matter was held in San Francisco, California, on January 5, 1979. The claimant, and employer/carrier (hereinafter referred to as respondent) were represented by counsel and were afforded a full opportunity to be heard, to adduce evidence, to call, examine and cross-examine the claimant, to make oral arguments and to submit post-hearing briefs.

Prior to the trial the parties entered into substantial stipulations (Tr. 5-6). There was agreement that the claim-

ant on July 29, 1973, sustained a 70 percent permanent partial disability to his left leg which, in the event coverage were found under the Feceral Act, would entitle him to benefits under section 8 (c)(2) of the Act at a compensation rate based on an average weekly wage of $269. 73 per week. There was a further stipulation that the claimant's injury occurred in the course and scope of his employment upon navigable waters of the United States.

Part of the facts agreed to by the parties included a stipulation that a State of California Workmen's Compensation claim was filed on February 10, 1975, under which the respondent voluntarily paid compensation to claimant for temporary total disability from July 30, 1973 until February 15, 1975, at a compensation rate of $105.00 per week, at which

time claimant reached a maximum medical improvement (Tr. 5). Thereafter payments to claimant continued from respondent at a rate of $70.00 per week under this same state workmen's compensation claim from February 15, 1975. On April 3, 1975, however, respondent filed a state form indicating it was controverting the state claim. On January 8, 1976, a stipulated award was granted to claimant by the Workers' Compensation Appeals Board of the State of California for the permanent partial disability arising out of claimant's work-related injury. (Cl. Exh. #1).

In light of the stipulations of the parties, the primary issue initially presented at the hearing was whether there was coverage under section 2(3) of the Federal Act for the injury in question. However, it was noted that in his post-trial brief respondent's counsel had not

only requested judicial notice of certain items, but had also broadened his theory of lack of coverage under the Federal Act. In this respect he alleged that the award to claimant of January 8, 1976, by the Workers' Compensation Appeals Board of the State of California for permanent partial disability of the left leg, constituted res judicata barring any further award under the Federal Act pursuant to the full faith and credit clause of Article IV, Section 1, of the U.S. Constitution. Counsel for claimant was thereafter given opportunity to file a reply brief addressing himself to the broadened coverage issue as well as the requested judicial notice (ALJ Exh. No. 1). The briefs regarding these issues have been duly considered.

Judicial Notice

As to the judicial notice requested

by respondent, it was not opposed and is taken as to the Findings and Award of the California Workers' Compensation Appeals Board of January 8, 1976, based upon stipulations of the parties of December 30, 1975, concerning claimant's injury of July 29, 1973. Evidence of this award had already been received at trial. (Cl. Exh. #1). Judicial notice is also taken of the state document entitled Stipulation With Request For Award filed with the State Appeals Board, which is marked and entered into evidence as ALJ Exh. #2.

As to the judicial notice of the street location of the employer's manufacturing and sales facility, this is also already part of the trial record. (Tr. p. 15). Judicial notice is, however, not taken as to the alleged facts that there are no navigable waters of the United States, no

marine railways, no dry docks or other construction areas above the expanded and navigable waters of the United States at this location. To take judicial notice of these alleged facts long after trial has been concluded, when claimant no longer has the opportunity to present evidence to the contrary, would violate the fundamental principles of the due process. Jordon v. Davis Construction Corp., 9 BRBS 527, 530 (1979).

Findings of Fact

Claimant began work with employer in 1968. He had an informal relationship based on friendship with the president of this company since 1958. (Tr. 24, Jt. Exh. #2, p. 3). This earlier relationship involved him in the racing of high-performance race boats owned by employer. Following his formal employment he initially was assigned to the

shipping and receiving department of employer's business operation, concerned primarily with the construction and sale of high-performance pleasure boats, including craft used for racing. After about two years, claimant became a boat salesman and manager at the same facility. In this position claimant basically was concerned with acquiring orders for the high-performance craft from customers. (Tr. 18). However, after taking an order for a new boat he would "have to watch the boat from beginning to end, so to speak, to make sure that all the options and so forth are included in the manufacture of the boat." (Tr. 19). Every boat would be inspected by him prior to delivery, not only in respect to the equipment ordered, but also to the hull construction, for possible defects. Any major repairs needed were performed by

the factory workers. On racing craft he was testing he would sometimes perform general maintenance, such as replacing fatigued parts, switches, ets. (Tr. 41).

In addition to his sales work, claimant also continued the activity of testing and racing of employer's boats from from the time of his hiring in 1968, particularly new models to determine the quality of their performance. He performed these activities over many different bodies of water nationally, although the West Coast was generally the geographical area. The purpose of the racing activities was not only to test boat performance, but also to promote sales of employer's craft. (Tr. 24). Claimant's activities in this respect, mostly on weekends, were all arranged and paid for by employer. (Tr. 21). He estimated that this promotional racing activity took place 25

to 30 "times or weekends" a year. (Tr. 21). It was in the course of one of these weekend trips that claimant on July 29, 1973, was injured when the racing boat he was operating, "Jokers Wild," an eighteen and one-half foot drag boat, apparently turned over in the Oakland Estuary, an undisputed navigable body of Water.

Conclusions of Law

Jurisdiction under the Act

The threshhold question to be addressed is the defense raised by respondent in respect to res judicata and full faith and credit under Article IV, Section 1 of the United States Constitution. In this respect I find that the doctrine of res judicata is properly applied in this matter since the application filed by claimant under the Workmens' Compensation Law of California is the same compensa-

tion claim for the same work-related injuries as that now pursued under the Federal Act, involving the same essential parties. Landry v. Carlson Mooring Service, et al. 9 BRBS 518, 521 (1979). Therefore, the crucial question to be answered is what effect an award by the Appeals Board would be accorded in the State of California. Under the full faith and credit clause of Article IV, Section 1 of the Constitution, the state award given by the Appeals Board has the same effect in federal court as it does in state court. As pointed out in Landry, supra, this principle of full faith and credit applies by statute, 28 U.S.C. §1738, to federal as well as state courts. Thus, the fact that there is a federal versus a state compensation scheme, as in the instant case, and not a state versus a state scheme is not relevant.

As pointed out in Landry, supra, however, each case must be considered on its own facts and be limited by its own set of circumstances. This would include, of course, the state law involved and the effect given under that state law to the award by the California Appeals Board.

In another relevant decision issued some nine months before Landry, supra, Thomas v. Washington Gas Light Co., 9 BRBS 760, the Board recognized that in the absence of an explicit prohibition against seeking additional or alternative relief under the laws of another jurisdiction, the granting of successive awards in different jurisdictions was valid. In Thomas v. Washington Gas Light Co., supra, reliance is place upon the case of Industrial Commission v. McCartin, 300 U.S. 622 (1947). This particular case is also discussed in Landry, supra,

at 524. In Landry, supra, the Board recognized the "decisive significance" given by the Supreme Court in the McCartin case, supra, to the state statute which provided that recovery under the Illinois statute did not preclude recovery under the statutes of other states. Such a reservation clause was not contained in the state act or in the judgment awarded by the state court in the Landry case, and the McCartin case, supra, was therefore found to be of no precedential value.

Turning to the California state statute herein involved, and the res judicata effect to be accorded to that statute, I find that this matter has been examined by the Board in an earlier decision, Ekar v. International Union of Operating Engineers, 1 BRBS 406 (1975). 1/ In that case

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1/ See also an essentially pre-'72

In a later edition of his authoritative work, Workmen's Compensation Law, §85.10 (1977), Larson also goes on to say: "It is now generally accepted that the McCartin case, in general effect, has recognized the principle of successive awards and thereby discredited the Mognolia case..." a California union official, employed by the parent organization in the District of Columbia, was murdered in California under circumstances found to have been in the course and scope of his employment.

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discussion of this problem by Authur Larson, in 45 Southern California Law Review 699 (1972). Larson generally concludes (at p. 729, et seq.) that where the sequence takes the form of state benefits followed by federal, that the case of Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962) and its progency provides strong authority for concluding that acceptance of state benefits does not constitute a binding election barring award of federal benefits. His discussion provides little assistance, however, for a post '72 amendment view of the application of the res judicata and full faith and credit doctrines.

His widow, who lived in California, filed a claim under the Workmens' Compensation statute of the state as well as in the District of Columbia, where workmen's compensation claims are administered under the Federal Act. Benefits were paid and accepted by the claimant under the California workmen's compensation statutes. She then sought her remedies under the Federal Act. The employer argued, as it does here, that the full faith and credit provisions of the U.S. Constitution required that the District of Columbia recognize as final the award made under the California workmen's compensation statute. The argument was based upon an interpretation of that statute which made the state remedy exclusive.

The pertinent provisions of the California statute which were cited by the Board, and which remained unmodified

during the periods relevant herein, read as follows:

> Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is, except as provided in section 3706, the exclusive remedy for injury or death of an employee against an employer or against any other employee of the employer acting within the scope of his employment, except that an employee, or his dependants in the event of his death, shall, in addition to the right to compensation against the employer, have a right to bring an action at law for damages against such other employee, as if this division did not apply, in either of the following cases:
>
> (1) Where the injury or death is proximately caused by the willful and unprovoked physical act of aggression of such other employee.
>
> (2) When the injury or death is proximately caused by the intoxication of such other employee. California Labor Code Section 3601(a), (1) and (2). (West 1974).

The Board, in examining the California provisions and the rationale of California case law cited by respondent herein, concluded that the exclusive workmen's

compensation remedy referred to acted only to preclude common law actions in California and did not contemplate the exclusion of compensation awards by other and separate compensation jurisdictions. Examination of the California state court decisions led the Board to conclude that the exclusive remedy provisions referred to above meant only that the Workmen's Compensation award was provided in lieu of permitting an election to file a state action at common law. It concluded that the California statute did not contemplate barring an employee "from subsequently seeking workmen's compensation benefits in another jurisdiction which has legitimate interest in his claim by virtue of the employer/employee relationship in effect at the time of the accident." (Emphasis supplied). In light of this state statute and the state court decisions examined by the Board, it was

found that the subsequent claim filed by the claimant in that case under the Federal Act did not conflict with the California statute and allowing the claimant to proceed did not constitute a denial of full faith and credit. On appeal to the Court of Appeals for the District of Columbia Circuit, this Board decision was affirmed, the appeals court finding that the Board was correct in its decision that the full faith and credit clause was not violated by either the extension of the District of Columbia's workmen's compensation code or the refusal to find that the California Workers' Compensation Act was the exclusive remedy for the benefits claimed. Director, Office of Workers' Comp., Etc. v. Boughman, 544 F.2d 210 (1976). The California State Court decisions and the principles established therein were examined by the Board in the

Ekar, case, supra. I find that the Board decision and its subsequent affirmance by the Court of Appeals for the District of Columbia Circuit is dispositive of the issue of full faith and credit in this case. The claim filed herein uder the Federal Act does not conflict with the California statute and allowing the claimant herein to proceed does not constitute denial of full faith and credit under the United States Constitution, in the circumstances of this case.

In respect to jurisdiction, there remains the determination of whether claimant meets the so-called status and situs tests under §§2(3) and 3(a) of the Federal Act. As to situs, I accept the stipulation of the parties that claimant's injury occurred over what is commonly known to be navigable waters of the United States, the Oakland Estuary. (Tr. 5, Jt.

Ex. #2, pps. 10-12). There remains for consideration, therefore, whether claimant meets the definition of "employee" under section 2(3), which provides in pertinent part:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under 18 tons net.

Prior to the decision of the Board in Sedmak v. Perini North River Associates, 9 BRBS 378 (1978), claimant's injury, occurring as it did over navigable waters, would have satisfied the status test under the earlier decision of Stewart v. Brown & Root, Inc., 7 BRBS 356 (1978). In Sedmak, supra, at p. 385, the Board concluded that injury over navigable waters in and of itself is insufficient to deter-

mine the status of maritime employment. Instead, the Board adopted the standard that ". . .a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed martime employment under section 2(3)." In this respect it is necessary to look to a claimant's overall employment, and not simply at the incident giving rise to the injury. Brown v. Reynolds Shipyard, et al., 9 BRBS 614, 617 (1979).

Examining the claimant's overall employment responsibilities, it is clear at the outset that claimant does not qualify under section 2(3) of the Federal Act as a longshoreman or as a person engaged in longshoring operations. Neither is claimant a harbor worker as that term has been defined by the Board in Stewart

v. Brown & Root, Inc., supra. I further find that claimant does not fall within the category of a ship repairman, ship-builder or ship-breaker. Claimant described his own position, at the times relevant herein, as that of a boat salesman, with duties typical of that occupation. (Tr. pps. 17, 18, 19, 25-28). It is true that claimant spent some portion of his office time, perhaps as much as 30 percent, inspecting before delivery various boars being manufactured by the employer, to ascertain, for example, that the boat contained the proper equipment as ordered by the customer, that it was the proper color and that there were no cosmetic defects on the hull. (Tr. 38). Any required adjustments were made by the workers in the plant actually working on the craft in question. (Tr. 41). I find all of these activities of the claimant

were incidental to his primary role as the salesman manager. (Tr. 26). Insofar as testing of boats was concerned, claimant testified that this was rarely done with standard models (Tr. 39) but only with new models. During the course of this testing, he would on occasion replace a fatigued part. In respect to any testing of boats the Board has held in dictum, which I find applicable to this case, that:

> We do not consider the testing of a boat by an employee of the employer to be part of vessel construction. (Napoles v. Donzi Marine, 5 BRBS, 699 (1977).

The occasional replacing of a fatigued part during this testing cannot meet the statutory definition of a repairman. Thus, claimant cannot qualify as a shipbuilder, ship-breaker or ship repairman.

Thus, for claimant to meet this "status test" it must be shown that he was engaged in some form of "maritime

employment" other than those operations expressively recognized in section 2(3). Sedmak, supra, at page 384. Claimant seeks to bring himself within this category of maritime employment by relying upon the fact that he was injured during the course of qualifying one of the employer's high-performance boats for a drag-boat race the next day, an activity which he performed on numerous previous occasions. He places his reliance on the case of Parker v. Motorboat Sales, 314 U.S. 244 (1941), a case involving a janitor who drowned while assisting another employee to test a motorboat engine. Apart from the substantial fact disparity between that case and the instant one, the Board has clearly established that pre-amendment case law is not controlling but serves only as a useful framework to ascertain maritime employment. Sedmak,

supra, at p. 387. Rather, I must examine this matter within the parameters provided by the Sedmak case, supra.

In examining the overall activities of the claimant, I must conclude that claimant's employment did not have a realistic and significant relationship to the maritime activities involving navigation and commerce over navigable waters contemplated by Congress in amending the Federal Act. It is clear from the evidence that claimant was employed by the respondent herein as a sales manager for the promotion of high-performance pleasure boats. In this work he continued to boat-racing activities in which he had participated with the respondent for ten years prior to his employment in 1968. The purpose of these racing activities was to promote boat sales (Tr. 24) as well as to allow claimant to participate in this activity for

"his own pleasure." (Jt. Exh. #2, p.5). As such, these activities were incidental to claimant's primary employment as a boat salesman and manager for respondent. As such, it does not fall within any category of "maritime employment," expressed or implied in the Act. In my opinion Congress, in acting to provide adequate workmen's compensation coverage for "maritime workers" under the Act as amended, did not have in mind protection of the claimant as he operated "Jokers Wild" in the Oakland Estuary, in preparation for a drag-boat race.

I therefore conclude from evaluating claimant's overall activities, including the incident of the boat-racing injury, that none of his activities bring him within section 2(3) of the Act, nor do they have a "realistically significant relationship to maritime activities,

including navigation and commerce over navigable waters...." Cf. Rhodes v. Healy Tibbets Construction Company, et al., 9 BRBS 605 (1979). To provide coverage to the claimant under these circumstances would be "to provide coverage to workers under the Act based solely upon injury over navigable waters without regard to their individual status." Sedmak, supra, p. 386. The Board in that case held that such a result would create an untenable situation, namely a dual standard for determination of jurisdiction; one for workers, such as claimant, injured over navigable waters, and another for workers injured shoreside.

Having failed to establish that he is an eligible empoyee under the Act, the claimant's application for benefits must be denied.

Order

The claim for compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act filed by Lawrence Schwabenland is herewith denied.

JOSEPH A. MATERA
Administrative Law Judge

Dated: April 20, 1979
San Francisco, California

JAM:scm